

B.E. & K., Inc. and United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry, Local No. 366. Case 15-CA-7668

March 1, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On March 6, 1981, Administrative Law Judge Lawrence W. Cullen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

We agree with the Administrative Law Judge that Ramos' discharge from his supervisory position, without being given the opportunity to return to a rank-and-file position, constituted a violation of Section 8(a)(1) of the Act as well as Section 8(a)(3). However, under the facts of this case, we decline to adopt his recommendation to reinstate Ramos to his supervisory position. Rather, we find that the purposes of the Act will best be served by ordering Ramos' reinstatement to his former rank-and-file position.²

The evidence shows that Respondent's entire course of conduct, beginning with its hiring of additional pipe department employees on April 3 through 7, was aimed in part at Ramos and, through him, at all the prounion employees. Ramos' discharge just 10 days after his promotion to supervisor over a newly formed crew was a planned, integral, and necessary step of Respondent's overall scheme to thwart its employees' exercise of Section 7 rights and thus violated Section

8(a)(1). However, as the Administrative Law Judge found, Respondent's "scheme" began while Ramos was a rank-and-file employee. The makeup of his crew and his selection as foreman were part of that scheme. Had Respondent not embarked on its unlawful course, it is unlikely that Ramos would have become a foreman on April 7. Thus, the status quo will be restored by Ramos' reinstatement to the position he was in before the unlawful scheme began.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, B.E. & K., Inc., Cantonment, Florida, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

MEMBER JENKINS, dissenting in part:

I would not rely on *Wright Line*, a Division of *Wright Line Inc.*, 251 NLRB 1083 (1980). The Administrative Law Judge correctly found that Respondent's alleged lawful reasons for the April 17 layoffs were "pretextual" and not justified by any business or economic considerations. Thus there was no genuine lawful motive in existence here; only the unlawful one was genuine. *Wright Line* was directed only at resolving the causation issue when a genuine lawful cause or purpose exists along with a genuine unlawful cause; to use *Wright Line* where only the unlawful cause is genuine is to engage in a sham analysis which can have only one outcome; and such sham application eventually stultifies the analysis and its effectiveness in treating the real problem to which it was directed.

³ Member Zimmerman agrees with his colleagues that Respondent violated Sec. 8(a)(3) of the Act by promoting employee Ramos to a supervisory position and subsequently discriminatorily discharging him pursuant to an unlawful plan designed to circumvent the Act. In such circumstances, the status quo will be properly restored by reinstating Ramos to the rank-and-file position that he held prior to the start of Respondent's unlawful scheme. Accordingly, Member Zimmerman finds that it is unnecessary to consider the allegations that Ramos' discharge violated Sec. 8(a)(1) of the Act. Further, Member Zimmerman rejects the Administrative Law Judge's reliance on *Nevis Industries, Inc. d/b/a Fresno Townhouse*, 246 NLRB 1053 (1979).

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me on November 17, 18, and 19, 1980, in Pensacola, Florida.¹ The hearing was held

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In finding a violation of Sec. 8(a)(1) with respect to Ramos, we find it unnecessary to rely on *B.E. & K., Inc.*, 252 NLRB 256 (1980), enforcement denied in part, Docket No. 80-1730 (4th Cir. 1981), and *Nevis Industries, Inc. d/b/a Fresno Townhouse*, 246 NLRB 1053 (1979).

¹ All dates are 1980 unless otherwise stated.

pursuant to a complaint issued by the Regional Director for Region 15 of the National Labor Relations Board on May 27, 1980, and is based on a charge filed by the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry, Local No. 366 (hereinafter referred to as the Charging Party or the Union), on April 25, 1980, on behalf of alleged discriminatees David Bridwell, Raymond E. Cobb, James G. Currenton, Elbie M. Hutcherson, Joe Jordan, Jr., James P. Parker, Eduardo Ramos, Mitchell W. Robbins, Paul F. Schachle, and Chester Williams, Jr. The complaint alleges that Respondent B.E. & K., Inc. (hereinafter referred to as Respondent), engaged in violations of Section 8(a)(1) of the National Labor Relations Act, as amended (hereinafter called the Act), by the interrogation of its employees concerning their union activities, by threats to close down the job and to discharge employees who engaged in union activities, and by the layoff of and refusal to reinstate Foreman Ramos as part of a pattern designed to interfere with its employees in the exercise of the rights guaranteed them under Section 7 of the Act. The complaint further alleges that Respondent engaged in violations of Section 8(a)(3) and (1) of the Act by reason of the discharge and refusal to reinstate alleged discriminatees Bridwell, Cobb, Currenton, Hutcherson, Jordan, Parker, Robbins, Schachle, and Williams. The issues in this matter were joined by Respondent's answer of June 10, 1980, wherein it denied the commission of the alleged unfair labor practices.

Upon the entire record made in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by counsel for the General Counsel, counsel for Respondent, and counsel for the Charging Party, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

It is admitted by Respondent, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted by Respondent, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a Delaware corporation with its principal office in Birmingham, Alabama, and is engaged in the engineering and construction of industrial plant facilities throughout the United States and was engaged as a contractor at the St. Regis Paper Company in Cantonment, Florida, at all times material herein. In November 1979, Respondent commenced work on a major plant expansion of the St. Regis Paper Company facilities in Cantonment, Florida. This project involved the removal and relocation of existing facilities and the installation of new facilities including connecting pipework. Respondent em-

ployed several crafts on the project including carpenters, ironworkers, laborers, and pipefitters. The alleged discriminatees were members of the pipefitters craft which includes the three classifications of pipefitters, welders, and helpers. Much of the pipework consisted of removing existing pipe facilities to accommodate new pipe facilities under construction. Additionally, the project involved the installation of new pipes, drains, and related facilities.

The General Counsel and the Charging Party contend that in January 1980 Respondent, by and through its agents,² commenced to interrogate and threaten its employees concerning an organizational campaign by the Charging Party (Union), that said organizational campaign commenced in March with the discriminatees having all become members of the Union by late March or early April, and that the pattern of interrogation and threats by Respondent's agents continued until April 17 when the discriminatees were laid off by Respondent and that Respondent has failed and refused to reinstate them because of their having engaged in concerted union activities. Nine of the discriminatees were employed as pipefitters, welders, or helpers in the pipe department of Respondent's St. Regis Paper Company project. The 10th discriminatee, Ramos, was a supervisor at the time of his layoff.³ Respondent principally defends itself by a general denial of knowledge of a union organization campaign and a general denial of a vast amount of the alleged incidents of interrogation and threats having taken place with some limited specific denials. Respondent contends that the layoff was caused by economic factors beyond its control because of lack of engineering drawings and blueprints and materials necessary to continue the job.

Each of the 10 discriminatees testified in the General Counsel's case. Project Superintendent E. D. Ruff, Pipe Superintendent James F. Fincher, General Foreman James T. McNeill, Foreman Roger Thompson, and Project Planner and Scheduler Frederick D. McAlmond testified on behalf of Respondent.⁴ Foreman Roger Salter, who was alleged in the complaint to have engaged in acts of interrogation of employees, did not testify.

B. Organizational Activity

Currenton, a pipefitter hired by Respondent in December 1979 and assigned to Foreman Salter's crew, testified that he became aware of the Union's organizing effort in early March when an old friend, Larry Guidy, asked him

² It was stipulated by the parties, and I find, that at all times relevant herein, James F. Fincher, James T. McNeill, Roger Thompson, and Roger Salter were supervisors within the meaning of the Act. I also find that Project Manager E. D. Ruff was a supervisor within the meaning of the Act at all relevant times herein.

³ It was stipulated by the parties, and I find, that at the time of his termination Ramos was a foreman and a supervisor within the meaning of the Act. It was further stipulated and I find that Ramos initially became a foreman on January 21, and remained so until March 17 when he left his foreman's position (when his crew was disbanded as a result of a reduction in force) and went back to his tools (became a nonsupervisory employee). On April 7, he became a foreman again and retained that position until his layoff on April 17.

⁴ All witnesses were sequestered except Currenton who was present on behalf of the General Counsel and McNeill who was present for Respondent.

to join and Currenton told Guidy he was not interested. Guidy contacted Currenton a week later and Currenton changed his mind and said he wanted to join and did so on March 28. On March 31, Currenton talked to Bridwell on the way to work and, when they arrived on the jobsite, they found their crew discussing the Union in the presence of their foreman, Salter. At that time, Salter's crew included four of the discriminatees (Currenton, Bridwell, Paul Schachle, and Williams).⁵ Later that morning, Randy Caylor (an acquaintance who had initially recommended Currenton to McNeill for a position with Respondent) asked Currenton about the Union and told Currenton that he was interested. Currenton told Caylor that he was a union member and subsequently that day Currenton, Bridwell, and Caylor clocked out early to go to the union hall and Bridwell and Caylor applied for membership.⁶

Bridwell testified that he was hired December 12, 1979, as a welder and worked in Salter's crew except for a 2-week period. Bridwell was active in the Union's organizational campaign. He signed his application and paid his dues for union membership at the end of March or the first of April.

Schachle testified he was hired as a welder in November 1979 and assigned to Salter's crew. He became aware of the union campaign in April, attended a union organizational meeting held at Jimmy Arnold's house in April, and joined the Union the next day.⁷

Williams testified that he was hired as a welder in November 1979, was initially assigned to McNeill's crew, was reassigned to Roger Thompson's crew, and was subsequently reassigned to Salter's crew in January. He became aware of the Union's campaign from Currenton, attended the meeting at Jimmy Arnold's house, and joined the Union the following day.

Cobb testified he was employed by Respondent in January as a welder and assigned to Roger Thompson's crew. He attended the meeting at Jimmy Arnold's house and joined the Union on April 4.

Hutcherson was employed by Respondent as a pipefitter in January and assigned to Roger Thompson's crew. He learned of the union campaign from Cobb and joined the Union on April 4.

Robbins was employed by Respondent in December 1979 as a pipefitter's helper and was initially assigned to Henry Randall's crew which was taken over by Ramos a month later. He was allowed to transfer to the ironworkers on the job in order to avoid a layoff when Ramos' crew was disbanded in February. He worked with the ironworkers for 2 months until he was transferred back to the pipe department on April 15 and was assigned to a new crew which was under the direction of Ramos. He became aware of the Union's campaign from Cobb and from discussions from other employees. He

signed an application for union membership on April 1 and paid his dues on April 16.

Parker testified he was hired on January 15 and worked until March 13 when he was laid off from Ramos crew in a reduction in force. He was rehired as a pipefitter on April 3, and was then assigned to Salter's crew. He testified he was aware of some talk of a union campaign prior to his layoff in March. He attended the Union's organizational meeting at Jimmy Arnold's house and joined the Union on April 2, the day before he returned to work.

Jordan testified that he was employed by Respondent as a welder assigned to Salter's crew on February 6, that he was allowed to transfer to the ironworkers craft on March 24 to avert being laid off, and that he was subsequently transferred back to the pipe department on April 8 and again assigned to Salter's crew. He was a union member at the time of his initial employment in February.

C. The Alleged Unlawful Interrogation and Threats

1. The alleged unlawful interrogation and threats of Currenton by General Foreman McNeill in January

Currenton testified that he was interrogated on three occasions by General Foreman McNeill in January. The first incident occurred the second week of January when McNeill went to the area where Currenton and Rudy Willis, the welder assigned to assist Currenton, were working and asked Currenton whether he had heard rumors concerning the Union's attempting to organize the job to which Currenton replied he had heard rumors but that as far as he was concerned they were just rumors. McNeill "asked me if I was being on the level with him, and I said, yes, I was. He said he believed me and that was the end of that conversation."

About a week later (the third week in January) McNeill again went to Currenton's work area and told Currenton he knew about Rudy Willis' having been involved in an organizational effort at Daniel's Construction Company. Currenton assumed McNeill also knew about his own involvement in that effort and told McNeill that both he and Willis had been involved but that was in the past and that he needed to work in the area to restore his name as a nonunion contractor. McNeill told Currenton "that he believed me, that I wasn't involved," and "as long as I stayed out of it I would have a job," and "as long as I stayed that way that I would be OK; that me and Rudy both would have a job."

In the latter part of January, McNeill initiated a third conversation with Currenton on the jobsite and told Currenton that Willis who had failed a welding test would not be rehired as a helper as a result of Project Manager Ruff's having found out that Willis and Currenton had been involved in a prior union organizing effort at Daniel's Construction Company's Pensacola job. McNeill told Currenton he had told Ruff that Currenton had his nose clean and that he (McNeill) would vouch for Currenton and he (McNeill) said that "as long as I kept it that way that I would have a job but I better keep my nose clean." In this conversation, McNeill also said,

⁵ This crew also included employees Caylor, Hammond, and Chambers who reported administratively to Foreman Salter but normally did not work as a part of the crew. It also included Matthews who was also laid off on April 17 but was not named as a discriminatee.

⁶ Currenton testified that Caylor subsequently advised him that he had canceled his check and Caylor did not become a member.

⁷ There was an organizational meeting held at Jimmy Arnold's house on April 1. Arnold was a union supporter who was not employed by the Respondent.

"Jim, you know if anything like that gets started on this job there's going to be some people lose their jobs."

McNeill denied having discussed union activity in January 1980 on the job with Currenton or any other employee or having asked any other employee questions concerning union activity or having told Currenton or any other employee that he or any other employees would be discharged if they engaged in union activities. He testified that he heard rumors of union activity but no more than on any other job. Project Manager Ruff testified that he was not aware of any union activity on the job and that he did not call Daniel's Construction Company concerning employee Rudy Willis. I found Currenton to be a credible witness who spoke with certainty and who spoke convincingly concerning the conversations between him and McNeill in January and I credit his testimony. I do not credit the testimony of McNeill which consisted of general denials that the conversations took place.⁸

Accordingly, I find that McNeill's questioning of Currenton in the second and third week of January was unlawful interrogation and that Respondent thereby violated Section 8(a)(1) of the Act. I find that McNeill's statements made to Currenton in the third week of January and in the latter part of January constituted unlawful threats and that Respondent thereby violated Section 8(a)(1) of the Act.

2. McNeill's directions to his foremen

Ramos testified that, while employed as a foreman for Respondent in February, McNeill called a meeting of his foremen in the middle or latter part of February which was attended by Foremen Salter, Roger Thompson, Oglesby, and Ramos and that McNeill told the foremen "if we knew anybody that had anything to do with the Union to carry them to the gate." Ramos testified this meant to fire them. Ramos testified further that he subsequently attended a foremen's meeting attended by Foremen Salter, Oglesby, Roger Thompson, and Cliff Thompson at which McNeill stated that he personally would fire any foreman that had anything to do with the Union. I credit Ramos' testimony concerning the events of the two foremen's meetings.⁹ Ramos' testimony in this regard was not rebutted by Respondent. McNeill did not deny having made the statements attributed to him by Ramos in these two meetings. Foremen Salter, Oglesby, and Cliff Thompson were not called as witnesses by Respondent. I also find that the failure by Respondent to inquire of Foreman Roger Thompson concerning these meetings compels an adverse inference.

⁸ I did not find McNeill or Ruff to be credible witnesses for reasons which will be set out *infra* in this Decision. To the extent that their testimony conflicts with any of the discriminatees (each of whom I found to be credible witnesses), I credit the testimony of the discriminatees over that of either McNeill or Ruff.

⁹ I found Ramos to be a credible witness who testified in a believable and convincing manner. There were some minor inconsistencies between Ramos' testimony and information supplied in his affidavit covering the posting of the list on April 17. However, I did not find these to be essential to his credibility.

3. Alleged unlawful interrogation by Foreman Salter

Currenton testified that, on the morning of April 1 (which was the day after he and Bridwell and Caylor went to the union hall), Salter approached him and Bridwell at the lime kiln area where they were working and said, "I heard they were selling books for \$325," whereupon Currenton said, "[Y]eah Roger, that's what I heard" and Salter said, "[Y]ou know, I heard some guys in my crew might have a book." Salter then said, "[A]s a matter of fact I heard Randy (Caylor) had one; maybe two more." And Currenton then acknowledged that Caylor, Bridwell, and he each had a book and Salter said that he (Salter) had tried to get a book previously. Currenton then informed Salter of the union meeting at Jimmy Arnold's house that night. Salter declined to attend because of his status as a foreman but asked Currenton to tell him the next day about the meeting. Currenton testified that the union meeting was attended by himself, Bridwell, Caylor, Williams, Paul and Vince Schachle, Cobb, Troy Bledsoe, Ronnie White, Parker, and some others whom Currenton could not remember in addition to some union officials. The next morning Bridwell and Currenton were the first two men in their crew to get to their reporting place. Salter was already there and Currenton asked Salter whether he (Salter) was ready to join the Union and Salter laughed and said, "[Y]eah, tell me all about it." Bridwell and Currenton did so. The following day, April 3, Salter came to the area where Currenton was working and said "that they had a list of the people who were at the meeting and a list of people who had union books already. It was one list, but they knew who had books and who had been at the meeting." On inquiry from Currenton, Salter said, "I know they've got a list." Salter said the list was about 80-percent accurate. Currenton then inquired whether certain names were on the list and Salter told him whether or not the particular name was on the list. He also told Currenton that Hammond and Caylor were not on the list. Currenton testified on cross-examination that Salter had estimated that a dozen or more names were on the list. Bridwell's testimony was generally corroborative of Currenton's with respect to the discussions with Salter. Bridwell added that, when Salter told Currenton and Bridwell about the list, he also told them to "walk the straight and narrow and if we were caught doing anything wrong we would be terminated." He warned them not to discuss the Union. Ramos testified that Salter told him about the list which Salter said had been shown to him by McNeill and which included Ramos', Currenton's, and Williams' names and had also included Glen Hammond's and White's names but that these two names had been erased.

Williams testified that Salter had told him and Currenton about the list and that he (Williams) was at the top of the list and to be careful on the job or they could be discharged. Parker who was assigned to Salter's crew on April 3 after he returned to work from his layoff of March 13 testified that Salter told him on April 3 that he was glad Parker was in his crew which was the only union crew. He also testified that, on the afternoon of

April 3, Salter approached him and Paul Schachle in the old "Fab" (fabrication) shop and showed him a list with their names on it and said that "they" knew we were at the meeting and might have our books. Paul Schachle corroborated Parker's testimony in this regard but testified that he himself, however, had not seen the list although he had seen some papers. Jordan also testified to a conversation with Salter wherein Salter inquired whether Jordan was in the Union. Jordan fixed the time of the conversation as sometime before he was transferred to the ironworkers.

I credit the testimony of Currenton, Bridwell, Williams, Parker, Paul Schachle, and Jordan concerning their conversations with Salter.¹⁰ Respondent did not call on Salter to testify. The credited testimony of these discriminatees with respect to their conversations with Salter thus stands un rebutted on the record.

I find that Salter's questioning of Currenton and Bridwell, on April 1 and 2, constituted unlawful interrogation. I find Salter's statement to Bridwell on April 3 that he should walk the straight and narrow or risk termination constituted an unlawful threat. I find Salter's statement to Williams that his name was on the top of the list and to be careful or he would be discharged constituted an unlawful threat. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by reason of the acts of interrogation and threats of the discriminatees engaged in by Respondent's agent, Salter, as set out above.

4. Alleged unlawful interrogation and threats by Foreman Roger Thompson

There were also allegations of 8(a)(1) violations involving Foreman Roger Thompson. Hutcherson and Cobb who were assigned to Roger Thompson's crew testified as follows concerning them. Hutcherson testified that in the first week of April, Roger Thompson approached him at his worktable at the new demineralizing area and asked him whether he had any knowledge of the Union's attempting to organize the job to which Hutcherson replied he had only heard rumors. Thompson then stated, "Elbie, if you know of anybody that joined the Union, or talks about the Union, you let us know and we'll get them fired." Hutcherson testified further that, on April 8 or 9, Roger Thompson stated that it looked as if the Union were trying to organize the job (come in) to which Hutcherson replied, "[W]ell, they'll probably try." Cobb testified that, in the first week of April, Roger Thompson approached him and asked if he had obtained a union book to which Cobb replied, "no." Additionally, Paul Schachle testified that, on April 8 or 9, Roger Thompson asked him "what's this about the Union" and inquired what he (Schachle) knew about the Union. Williams also testified that on the following week after the union meeting Thompson told him his name was on the top of the "list."

Roger Thompson testified on behalf of Respondent and denied having made any inquiry of Hutcherson regarding the Union. He admitted to having asked Cobb whether he had joined the Union and that Cobb had told

him "no." He denied telling Williams or any other employees that their names were on a list. He also denied having any knowledge of a list. He denied having inquired of Schachle concerning his knowledge of the Union or any union activity.

I credit the testimony of Hutcherson, Cobb, Paul Schachle, and Williams concerning their conversations with Roger Thompson. I found their testimony to be positive, clear, and convincing. Conversely, I found Roger Thompson to be hesitant in his answers on cross-examination and do not credit his denials that these conversations even took place as testified to by discriminatees. As noted above, Thompson admitted to having inquired of Cobb as to whether he was a union member. Accordingly, I find that Thompson's questioning of Hutcherson concerning his knowledge of union activity constituted unlawful interrogation in violation of Section 8(a)(1) of the Act and his statement to Hutcherson that employees who joined the Union would be fired constituted an unlawful threat and that Respondent thereby violated Section 8(a)(1) of the Act. I also find that Thompson's questioning of Cobb and Schachle constituted unlawful interrogation and that Respondent thereby violated Section 8(a)(1) of the Act.

5. Additional allegations of 8(a)(1) violations involving General Foreman McNeill

Currenton testified that on a Tuesday or Wednesday of the week following the week of the union meeting (April 8 or 9) McNeill approached him and Paul Schachle as they were working on the steam trap in the corner of the building. At that time Currenton asked McNeill concerning rumors that the Company was going to be unionized to which McNeill replied, "[D]on't believe a word of it. Ted Kennedy will never go union on this job or any other job; he'll close the job down before he ever works union." Ted Kennedy was identified by Currenton and subsequently by McNeill as either an official or part owner of the Company. Currenton then told McNeill he had been wondering about the rumor. Currenton testified that McNeill replied, "[D]on't worry about it. As long as I've got a job out here, you'll have a job. We'll lock the gate together when we leave. You just keep your nose clean." No inquiry was made of Schachle concerning this conversation. McNeill denied making the statements attributed to him by Currenton. I credit the testimony of Currenton, I do not credit the denial of McNeill.

Hutcherson testified that, on or about April 10, McNeill approached him and said, "Elbie, I want to ask you a question." Hutcherson anticipated the question and told McNeill he thought he knew what the question was and asked whether the matter was between them which McNeill assured him it was. Hutcherson then told McNeill that he was going to get a union book. Hutcherson testified that McNeill then stated "that's what I was going to ask you." At that time Jordan approached and Hutcherson told McNeill that "Joe's a union man, too" and McNeill replied that was what he wanted to know. Jordan testified that he heard Hutcherson tell McNeill that he (Jordan) was in the Union also. Jordan further

¹⁰ I found Bridwell, Williams, Parker, Paul Schachle, and Jordan to be credible witnesses as well as Currenton whom I previously credited.

testified that McNeill inquired of him whether this was correct and Jordan replied, "yes." McNeill testified that this discussion related to membership in a masonic lodge to which he and Hutcherson belong and that Hutcherson told him that Jordan was a member of the lodge also. I credit the testimony of Hutcherson and Jordan and do not credit the testimony of McNeill.

Currenton testified that he initiated a meeting with McNeill at a softball field on the evening of April 10 and told McNeill that he was a union member and that the Union was organizing the job. McNeill asked Currenton to reconsider his decision and asked Currenton how strong the Union was on the job. Currenton replied that the Union was strong and gaining strength. I credit the testimony of Currenton in this regard which stands on the record as not being specifically rebutted by McNeill. To the extent that McNeill's general denial of having had conversations concerning the Union with Currenton and other employees may constitute a possible rebuttal of his testimony, I do not credit McNeill's denial.

Williams testified that, on the day before the layoff, McNeill came to where he was working and drove him in a pickup truck from the site and discussed the Union and told Williams that the Union was pricing itself out of work and offered to show Williams paperwork from the Company's attorney to substantiate that no union contractor had ever bid on the job. Williams was laid off the next day (April 17) and the paperwork was never shown to him. McNeill acknowledged that he had driven Williams around the project but stated that the conversation concerned an inquiry by Williams whether he would be terminated because he was a diabetic. McNeill stated he did not discuss anything else on the truck ride. I credit Williams' testimony in this regard; I do not credit McNeill's testimony or denials.

I find that McNeill's statement to Currenton on the Tuesday or Wednesday of the week following the union meeting (April 8 or 9) that Ted Kennedy would shut down the job if it were unionized and that Currenton should keep his nose clean was an unlawful threat and that Respondent thereby violated Section 8(a)(1) of the Act.

I find that McNeill's questioning of Hutcherson and Jordan on or about April 10 constituted unlawful interrogation and that Respondent thereby violated Section 8(a)(1) of the Act.

I find that McNeill's questioning of Currenton on the evening of April 10 concerning the strength of the Union constituted unlawful interrogation and that Respondent thereby violated Section 8(a)(1) of the Act.

I find that McNeill's offer of April 16 to show Williams paperwork from the Company's attorney to show that no union contractor had ever bid on the job and his assertion that the Union was pricing itself out of work constituted an unlawful threat and that Respondent thereby violated Section 8(a)(1) of the Act.

D. The Layoffs of April 17

On April 17, the 10 discriminatees and 2 other employees not involved in this case were laid off by Respond-

ent.¹¹ At the time of their layoff each discriminatee received a termination form with an identical marking of "fair" as an evaluation of their job performance out of four listed categories on the termination forms of "excellent," "good," "fair," and "poor." The termination forms were marked by McNeill, the general foreman, although they were normally marked by the foremen. Two of the discriminatees were subsequently reemployed by Respondent. Paul Schachle was reemployed on July 28 and was terminated shortly thereafter on August 6 or 7. Jordan was reemployed July 28 and was working on the site at the time of the hearing in this case. The General Counsel contends that the layoff was pretextual and unnecessary and that Respondent's sole motivation for the layoff and for the selection of the discriminatees for the layoff was their having engaged in protected concerted activity. As stated previously in this Decision the General Counsel alleges violations of Section 8(a)(1) and (3) of the Act with respect to the nine nonsupervisory discriminatees and alleges a violation of Section 8(a)(1) of the Act with respect to Ramos who was a supervisor under the Act at the time of the layoff. The General Counsel also contends that the rating of the 10 discriminatees as fair by McNeill constituted a part of Respondent's effort to finally rid itself of union adherents. Respondent denies that the layoff of the discriminatees was motivated by unlawful discriminatory purposes proscribed by the Act but rather contends that the layoffs were necessitated by economical considerations caused by the lack of sufficient engineering drawings and blueprints and the lack of materials needed to continue the job. Respondent contends that the layoff, itself, was not unusual with respect to this particular project, and that the selection of the discriminatees for layoff was normal under the circumstances as well as their having been rated fair by McNeill.

The discriminatees were selected for layoff from three crews. Ramos and Robbins were selected from the crew which had been made up on April 7 with Ramos then being made a foreman again. The other members of Ramos' crew were reassigned to other crews and were not laid off. Hutcherson and Cobb were selected from Roger Thompson's crew and the entire crew of Roger Salter except for employees Hammond, Caylor, Chambers, and Foreman Salter were laid off. In the case of Supervisor Ramos, Respondent contends that he was given the option to "return to his tools" as a rank-and-file employee when his crew was disbanded on April 17 but that he refused to do so. Ramos testified that he was not given this option. Neither Jordan nor Robbins was permitted to return to the ironworkers as they had been allowed to do to avert a layoff in a previous reduction of force.

The discriminatees testified at length that there was sufficient work to continue the job, that Respondent had hired additional pipefitters, welders, and helpers shortly before the layoff of April 17, that they had been given assurances by Respondent's supervisors and management

¹¹ It was stipulated by the parties that one of the other employees, Steven Barrington, volunteered for the layoff. The other employee, Scott Matthews, was not named as a discriminatee in the complaint.

representatives that there was a great deal of work to be done, and that they had survived previous reduction of force layoffs with the exception of Parker who was laid off and subsequently rehired on April 3. They testified that they had been complimented on their work. At the time of the layoff on April 17, virtually all of the discriminatees were engaged in unfinished projects and a major project of an underground 42-inch line was scheduled to commence the following week. In addition, a new crew had been set up on April 7 and Ramos had been returned to the position of foreman to lead that crew. Robbins had been transferred back from the ironworkers department to Ramos' crew only 2 days prior to the layoff. Jordan was transferred back to Salter's crew from the ironworkers on April 8. Furthermore, in early April after the union meeting of April 1, Salter informed several discriminatees that Respondent had a list of those employees who had attended the union meeting of April 1 and specifically named several of the discriminatees. Roger Thompson had also spoken of the existence of a list and told Williams that his name was on the top of the list. Ramos testified that during the week of April 17 he asked McNeill whether it was okay for him to join the Union and McNeill said to "go ahead." Subsequently that week Ramos inquired of McNeill whether there was going to be a layoff and McNeill told him that a big change was going to occur that week.¹²

Ramos testified that, on April 17, McNeill called all the foremen into his office and announced the layoff. Ramos testified that McNeill had a list similar to the one he had been told about by Salter and that his and Robbins' names were on the list. Ramos asked McNeill why he was not put back to his tools as before rather than be laid off and McNeill replied he could not help it as the list came from Birmingham (the home office of Respondent). Ramos testified he did not refuse to go back to his tools. Ramos further testified that the normal practice was for the foreman, rather than the general foreman, to select the men for a layoff. Ramos informed Robbins of the layoff. Hutcherson and Cobb were informed by Roger Thompson that they were to be laid off. Cobb testified at the time of the layoff he was on the scaffold preparing to make some welds and Roger Thompson called him down and upon questioning by Cobb as to the reason for the layoff initially said he was "out of work," and then said that he (Roger Thompson) had nothing to do with the layoff as it had come from Birmingham. Salter informed the members of his crew of the layoff. Currenton testified that Salter walked up and said, "[W]ell, they got most of you."

When the discriminatees received their termination slips, each was marked fair on his job performance and the slips were signed by McNeill. That evening Currenton, Schachle, Bridwell, and Parker went to see McNeill at his home and were informed he was coaching a ballgame at a nearby ballfield. They went to see him at the ballfield and McNeill and Roger Thompson were both at the game which was in progress. The discriminatees testified that, when they inquired as to the reason for their

layoff and their rating of fair, McNeill told them that the list of the employees to be laid off had come from Birmingham and he was told what to put on the termination slips and he had nothing personally to do with the decision.

Respondent's witnesses McNeill, Fincher, and Ruff denied knowledge of the union campaign.¹³ Respondent's witnesses testified that the layoff of April 17 was normal and occasioned by a lack of engineering drawings and blueprints and material and that the selection of the men was made by General Foreman McNeill which was normal under the circumstances. Ruff testified that the job had been occasioned by several layoffs as a result of the need for relocation of existing facilities and that the majority of the pipework was not scheduled to commence until the first of 1981. Ruff testified that two major projects had been completed and there was no material for the 42-inch underground pipe. He testified further that he attended a Monday meeting conducted by Planner and Scheduler McAlmond in the week of the layoff and that McAlmond indicated to him that there was not sufficient work for the number of men who were employed and that he (Ruff) thereafter informed Fincher that there would be a layoff. Ruff testified further that he met Fincher and McNeill on Wednesday afternoon, April 16, and that they recommended that 20 employees in the pipe department be laid off on that Thursday afternoon but he reduced the number to 12. Fincher and McNeill testified similarly concerning these discussions. McAlmond testified that at the Monday meeting (April 14) his schedule indicated that there was not sufficient work for the number of men on the project. Fincher and McNeill denied having told employees that the jobs would be of considerable length.

As to the selection of the particular men for layoff, Respondent's witnesses denied having any knowledge of the existence of a list from Birmingham. McNeill acknowledged that he had not consulted Roger Salter with respect to his recommendations for which men to lay off in his crew, although he considered Roger Salter as one of his best foremen. McNeill testified that he selected the men in Ramos' crew since the crew was to be disbanded. McNeill and Fincher testified that Ramos refused to go back to his tools but that he gave no reason and they did not inquire further. McNeill stated that he did ask Roger Thompson for his recommendation and that Roger

¹² The above is a composite of the credited testimony of the discriminatees.

¹³ I did not find McNeill, Fincher, or Ruff to be credible witnesses for several reasons. Initially all three of these witnesses denied having any knowledge of the existence of the union organizational campaign and only admitted to having heard rumors of union activities. In the face of the credited testimony of the discriminatees who testified to several incidents of unlawful interrogation and threats by McNeill, Salter, and Roger Thompson, I find the denials by Fincher, Ruff, and McNeill that they even had knowledge of the Union's campaign to be unbelievable. I also found Ruff to be argumentative on the stand and his answers on cross-examination to be unresponsive; I found Fincher's answers on cross-examination to be unresponsive. Additionally, McNeill's credibility was also severely damaged by his testimony on the stand that Robbins was selected for the layoff on April 17 because he (McNeill) had been told by Ironworkers Superintendent McCue that Robbins would not climb and his subsequent admission on cross-examination that he had never been told this by McCue after the General Counsel confronted him with his statement in his affidavit that McCue had never told him Robbins would not climb.

Thompson gave him his recommendation of Cobb and Hutcherson for layoff and that these happened to coincide with the recommendations that he himself was making for layoffs from Thompson's crew. McNeill testified on cross-examination that he rated all the discriminatees fair because the job had been slowing down and he would want to talk to them prior to rehiring them. He also acknowledged the slowdown might have resulted from the fault of management as much as the men. He acknowledged that he had not consulted with any of the men or advised them of any failure of performance on their part. Thompson testified that he told McNeill that he would be losing some good men from his crew by reason of the layoff. He would have rated Hutcherson as good and Cobb as fair on their job performance. Fincher acknowledged on cross-examination that Salter's crew was the most efficient crew on the job at the time of the layoff. Fincher and Ruff both testified that fair would mean at least the men would have to be talked to prior to coming back to work, and that excellent or good would mean that they would automatically be eligible for rehire. McNeill and Thompson also acknowledged that the four employees came to the ballgame in progress the evening of April 17 and inquired as to why they had been laid off and rated fair, but testified that McNeill had told them that he was busy with the ballgame and did not have time to talk to them. Both denied that McNeill had told them that the layoff and the marking of their performance as fair was a result of a list or instructions that had come from Birmingham.

I credit the testimony of the discriminatees regarding the layoffs of April 17 as set out above. I find that Respondent engaged in an unlawful campaign against the Union's organizational efforts through unlawful interrogation and threats of its employees concerning their union activities and that Respondent compiled a list of union supporters and utilized that list to select them for the layoff of April 17 which layoff I find was pretextual and was not justified by economic or business reasons. There were numerous incidents of demonstrated union animus on the part of Respondent including acts of interrogation, threats, and instructions to its foremen to terminate union supporters. I conclude that the April 17 layoff was not justified by economic considerations for several reasons in addition to the demonstrated union animus on the part of Respondent. The hiring of new employees shortly prior to the layoff of discriminatees, the transfer of Robbins and Jordan back to the pipe department, the makeup of a new crew to be headed by Ramos as foreman on April 7, the instructions to Ramos concerning new work to be performed, and the numerous assurances to the discriminatees that there was a great deal of work available are all actions taken by Respondent which are simply inconsistent with an impending layoff. I do not find Respondent's exhibits with respect to a shortage of engineering drawings, blueprints, and material to be determinative in this case. I find that the marking of all of the discriminatees as fair on their job performances including Parker who had previously been marked as good in a prior layoff is further evidence of Respondent's intent to assure that the discriminatees were not rehired as borne out by the additional hire of a number of new

employees in the pipe department subsequent to the April 17 layoff with the rehire of only Schachle and Jordan.

I find that under the rationale of the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the General Counsel has made a *prima facie* case of violations of the Act by reason of the April 17 layoffs and the refusal to reinstate the discriminatees and that Respondent has failed to rebut this case by a preponderance of the evidence. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by the April 17 layoff and discharge of the nine non-supervisory discriminatees.

With respect to the layoff of Foreman Ramos, Ramos testified that he filed an application to join the Union either the end of March or the first of April at a time when he was a rank-and-file employee, that he communicated his interest in the Union to other employees, and that he was informed by Salter at the end of March or the first of April while a rank-and-file employee that McNeill had a list of employees who belonged to the Union and that Ramos' name was on the list. On April 7 (10 days prior to the layoff of April 17) a new crew was made up and Ramos was again selected to become a foreman. At this time he was told by Fincher that there was a great deal of work to be performed and that his crew was to finish the work at the digester and that his crew would be assigned to the 42-inch underground pipe job when it began. Ramos testified that there was another month of work left for his crew to do on the digester and the necessary materials and fittings were available to complete this job as of the date of the layoff. Ramos testified that, when he and the other foremen were called to McNeill's and Fincher's office on April 17, he was shown a list of people to be laid off by McNeill which included his name and that of Robbins from his crew whereas a recently hired employee in Ramos' crew was not laid off. When Ramos inquired as to why he was not permitted to return to his tools as a rank-and-file employee as before, he was told by McNeill that the list had come from Birmingham. Ramos testified that he had previously been complimented on his work. His job performance was also marked as fair on his termination form by McNeill. I credit the testimony of Ramos over that of Respondent's witnesses including McNeill and Fincher who testified he refused to return to his tools but that they did not inquire further.

Accordingly, I conclude that the makeup of Ramos' crew, his selection as foreman, his subsequent discharge from his supervisory position from a list made up by Respondent of known union supporters without being given the opportunity to return to his rank-and-file position as he had previously, and the marking of his job performance as fair on his termination form were part of an overall scheme by Respondent to rid itself of all union adherents and constituted a violation of Section 8(a)(1) of the Act. See *Navis Industries, Inc., d/b/a Fresno Townhouse*, 246 NLRB 1053 (1979), and *B. E. & K., Inc.*, 252 NLRB 256 (1980), cited by counsel for the General Counsel which I find are directly in point.

I also find that Respondent violated Section 8(a)(3) of the Act by refusing to permit Ramos to return to his rank-and-file position. Respondent had work available for Ramos on April 17 but he was nevertheless denied the opportunity to return to his rank-and-file position as a result of his having applied for union membership while a rank-and-file employee. The desire of Respondent to rid itself of Ramos based on his union activity engaged in as a rank-and-file member is demonstrated by its upgrading him to a foreman's position on April 7 and then discharging him with an unexplained rating of fair by McNeill on April 17. This is particularly evident in view of his having been identified by Respondent as a union supporter. Although the General Counsel alleged and argued only an 8(a)(1) violation with respect to Ramos, I find the facts of the 8(a)(3) violation to be intertwined with those which give rise to the 8(a)(1) violation. See *Carbonex Coal Company*, 248 NLRB 779 (1980).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent as found herein, occurring in connection with the operations of Respondent as found in section I have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to disputes burdening and obstructing the flow of commerce.

CONCLUSIONS OF LAW

1. The Respondent, B.E. & K., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry, Local No. 366, is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating its employees concerning their union activities and the union activities of other employees, by threatening them that it would close down the St. Regis Paper Company project if they selected the Union to represent them, and by threatening its employees with discharge if they engaged in union activities, Respondent has violated Section 8(a)(1) of the Act.
4. By discharging and thereafter failing and refusing to reinstate its employees David Bridwell, Raymond E. Cobb, James G. Currenton, Elbie M. Hutcherson, Joe Jordan, Jr., James P. Parker, Mitchell W. Robbins, Paul F. Schachle, and Chester Williams, Jr.; by refusing to permit Eduardo Ramos to return to a nonsupervisory job; and by designating their job performance as fair on their termination forms, Respondent has violated Section 8(a)(3) and (1) of the Act.
5. By discharging and thereafter failing and refusing to reinstate its employee Eduardo Ramos, a foreman and a supervisory employee under the Act, and by designating his job performance as fair on his termination form, Respondent has violated Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed acts in violation of Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom and from any other unlawful activity and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, I recommend that Respondent be required to post the appropriate informational notice to employees in appropriate places in the pipe department and in any area under Respondent's control on the St. Regis project in Cantonment, Florida, where employees of the pipe department may report to work and I recommend the reinstatement of all unlawfully discharged employees, including supervisory employee Eduardo Ramos and that Respondent make them whole for losses due to discrimination against them and cease and desist from any other unfair labor practices. All loss of earnings and other benefits due under this Order shall be computed with interest in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER¹⁴

The Respondent, B.E. & K., Inc., Cantonment, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Coercively interrogating its employees concerning their union activities and the union activities of other employees.
- (b) Threatening its employees with discharge, loss of jobs, or a shutdown of its project at the St. Regis Paper Company in Cantonment, Florida, in order to discourage their support of the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry, Local No. 366, or any other labor organization.
- (c) Discouraging membership in a labor organization by discharging or refusing to reinstate in a timely fashion or reinstate at all or otherwise discriminating against employees in their hire and tenure.
- (d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

- (a) Offer to David Bridwell, Raymond E. Cobb, James G. Currenton, Elbie M. Hutcherson, Joe Jordan, Jr., James P. Parker, Eduardo Ramos, Mitchell W. Robbins, Paul F. Schachle, and Chester Williams, Jr., immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed.¹⁵

(b) Make the employees named above in section (a) whole for any loss of pay or any other benefits they have sustained by reason of the discrimination against them in the manner set forth in this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post copies of the attached notice marked "Appendix"¹⁶ on all bulletin boards and meeting places and work headquarters of the pipe department of the B.E. & K. portion of the St. Regis Paper Company project.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁵ Ramos is to be reinstated to his former supervisory position in the event the Board agrees with the finding of an 8(a)(1) violation or to his rank-and-file position in the event the Board agrees only with a finding of an 8(a)(3) violation.

¹⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in this notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees because of their union activities.

WE WILL NOT threaten employees with discharge, loss of job, loss of benefits, or other reprisals because of their union activities, membership, or support.

WE WILL NOT threaten to close down our operations at the St. Regis Paper Company project in Cantonment, Florida, to prevent union activities among our employees.

WE WILL NOT coercively interrogate employees concerning their union membership, activities, or support.

WE WILL NOT discourage membership or activities on behalf of the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry, Local No. 366, or any other labor organization by discharging employees or discriminating against them in their hire and tenure.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer David Bridwell, Raymond E. Cobb, James G. Currenton, Elbie M. Hutcherson, Joe Jordan, Jr., James P. Parker, Eduardo Ramos, Mitchell W. Robbins, Paul F. Schachle, and Chester Williams, Jr., immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without loss of seniority and other rights and privileges previously enjoyed.

WE WILL make whole the employees named above for any loss of pay or other benefits sustained by them by reason of our discrimination against them, with interest upon any moneys due them.

B.E. & K., INC.